UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

UNITED UNION OF ROOFERS, WATERPROOFERS, AND ALLIED WORKERS, LOCAL 162

and **Case 28-CB-080496**
28-CB-085690

A.W. FARRELL & SON, INC.

A.W. FARRELL & SON, INC.

and **Case 28-CA-085434**

UNITED UNION OF ROOFERS, WATERPROOFERS, AND ALLIED WORKERS, LOCAL 162

and

SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, AFL-CIO, LOCAL UNION NO. 88
Party in Interest

ANSWERING BRIEF TO ROOFER'S LOCAL 162'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION.

Pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board ("Board"), A.W. Farrell & Son, Inc. ("AWF" or "Employer") hereby submits this Answering Brief to the exceptions filed by the United Union of Roofers, Waterproofers, and Allied Workers, Local 162 ("Roofers Local 162" or "Local 162") to the decision Administrative Law Judge ("ALJ") Robert Ringler issued on May 13, 2013 ("Ringler Dec."). The ALJ correctly found that Local 162's 8(a)(5) charge against AWF is barred by the doctrine of collateral estoppel. [Ringler Dec., 10:35-12:10].[1] Roofers Local is estopped from relitigating issues previously decided between the parties. In a decision issued on December 28, 2011 in Case Nos. 28-CA-023502, 28-CA-060627, 28-CA-062301 ("Parke Dec."), ALJ Parke actually and necessarily decided that AWF had not agreed to a successor 2010-2012 bargaining agreement [Parke Dec., 7:40-45; Ringler Dec. 5, n. 9], and Local 162 should not be granted a second "bite at the apple" because they are dissatisfied with Judge Parke's decision.

The ALJ also correctly found that Roofers Local 162 had delayed or failed to provide relevant information to AWF, thus violations Section 8(b)(3) of the National Labor Relations Act ("Act"). [Ringler Dec., 12:15-13:25]. A union has a duty to provide information that mirrors the duty of the employer, and Roofers Local 162 failed to satisfy this duty.

The Board should not adopt more stringent standards for analyzing employer's handbook policies, as suggested by Roofers Local 162. The ALJ properly applied the rule set out in *Lutheran Heritage Village-Livonia*. 343 NLRB 646 (2004).

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[1] In this document, "Ringler Dec. __" refers to the decision of ALJ Ringler in the instant case issued on May 13, 2013. "Parke Dec. __" refers to the Decision of ALJ Lana Parke issued in Cases 28-CA-023502, 28-CA-060627, 28-CA-062301 and incorporated in the record of this case. "Tr. __" refers to the transcript in the instant proceeding, followed by the page and line number. "Parke Tr. ____" refers to the transcript in Cases 28-CA-023502, 28-CA-060627, 28-CA-062301 and incorporated into this record at JTX 119 1-206. "JTX __"refers to the parties Joint Exhibits, followed by the Exhibit number. "CAGC Exh. __" refers to the General Counsel's exhibits in the CA case followed by the exhibits number.

Further, the Board should adopt the remedies provided by the Ringler decision with respect to AWF. Roofers Local 162's proposed remedy of requiring AWF to rescind its contract with Sheet Metal Workers International Association Local 88 ("SMWIA Local 88" or "Local 88") is not warranted. The assignment of work by AWF between Roofers Local 162 and SMWIA Local 88 is a jurisdictional issue, which was subject to a 10(k) hearing before Hearing Officer Barbara Baynes in the Las Vegas NLRB office on June 13, 2013, and the 10(k) issue is presently pending before the Board.

II. RELEVANT FACTUAL BACKGROUND.

A. AWF's Collective Bargaining Agreement with Local 162 Expired in 2010 and No Successor Collective Bargaining Agreement was Reached.

AWF and Roofers Local 162 first entered a collective bargaining arrangement in June 2007, when AWF began operating in Las Vegas, Nevada, and AWF signed a successor collective bargaining agreement effective from August 1, 2007-July 31, 2010 ("Local 162 2007-2010 Agreement"). [JTX 89]. When the Agreement expired on July 31, 2010, AWF and Roofers Local 162 did not agree on a successor collective bargaining agreement. [Parke Dec., 7:40-45; Ringler Dec. 5, n. 9]. On May 10, 2011, Roofers Local 162 filed an unfair labor practice charge against AWF alleging in part that AWF had agreed to but had refused to sign the successor agreement for August 1, 2010 through July 31, 2012 ("Local 162 2010-2012 Agreement"). [JTX 119 384]. The Region issued a Complaint [JTX 119 372], and a hearing was held before ALJ Lana Park on October 24-25, 2011. Judge Parke found that AWF had not agreed to the Local 162 2010-2012 Agreement. [Parke Dec., 7:40-45; Ringler Dec. 5, n. 9].

During the hearing before Judge Ringler, Local 162 Business Agent Modesto Gaxiola testified about the 2010 contract negotiations and agreement, and he had already done so in the previous hearing before Judge Parke on October 24-25, 2011. [Tr. 222-227; Parke Tr. 137-145]. Both Mr. Gaxiola and Wade Landrum, Manager for AWF in Las Vegas, testified before Judge

Parke, which was the appropriate case to address this issue. The complete testimony on the issue of the 2010 contract negotiations and agreement is in the record, and Judge Parke's decision on the matter is part of the record in the present case.

Mr. Gaxiola's testimony before Judge Ringler was contradicted by the testimony of Mr. Landrum given before Judge Parke in the earlier case, which appropriately addressed the issue. Mr. Landrum, the AWF manager who was involved in the negotiations, was too ill from cancer to testify and was out of state seeking specialized treatment. [Tr. 26:24-27:4]. Mr. Landrum was unavailable as a witness before Judge Ringler and subsequently passed away from his cancer.

During the hearing before Judge Parke, Mr. Landrum and Mr. Gaxiola both testified. [Parke Tr., 51, 136]. Having had the benefit of the full testimony of both Mr. Landrum and Mr. Gaxiola and the ability to make credibility determinations, ALJ Parke determined that AWF had not agreed to the Local 162 2010-2012 Agreement and had rightfully refused to sign it. [Parke Dec., 7:40-45; Ringler Dec. 5, n. 9]. Judge Ringler appropriately recognized Judge Parke's decision as the law of the case and did not decide that AWF and Local 162 had reached a new successor agreement in 2010-2012.

Local 162 has attempted to paint a picture of contract negotiations in which Mr. Landrum was fully authorized to agree to a final contract. Local 162 would like the Board to believe that ALJ Parke's decision hinged solely on one email. [Local 162 Br. in Support of Exceptions, 5:10-15]. Local 162 has misrepresented the circumstances and testimony and Judge Parke's factual findings. The email, was not the only evidence before ALJ Parke. The testimony of Wade Landrum before ALJ Parke shows that Mr. Landrum had communicated to Local 162 and Local 162 was aware that only Mr. Bill Farrell, the Company owner, had the authority to agree to a collective bargaining agreement. [Parke Tr., 65:6-9, 74:18-21, 175:7-16]. During the entire relationship between AWF and Local 162, Mr. Landrum made clear that decisions about

bargaining and collective bargaining agreements were beyond his authority. Roofers Local 162 note on page 3 of their brief that Mr. Landrum acknowledged receipt of the 2010-2012 Agreement draft and was going to send it to his corporate office to receive okay. [Local 162 Br. in Support of Exceptions, 3:20-26]. Contrary to demonstrating that an agreement has been reached and that Mr. Landrum had authority to sign it, this demonstrates that Mr. Landrum did not have authority and had to send the agreement to corporate offices for approval. AWF and Local 162 did not reach an agreement on a successor 2010-2012 Agreement, and AWF lawfully declined to sign the Local 162 2010-2012 Agreement.

B. AWF Has Had a Long-Term Relationship with SMWIA and Valid Agreements with SMWIA Local 88.

AWF has had a relationship with the Sheet Metal Workers Association Local 112 in New York for approximately 40 years. [Ringler Dec., 3:9-14; JTX 113]. Based on the "Two Man Travel Rule" in Local 112 Agreement, SMWIA Local 88 asserted the right to work performed by AWF in Las Vegas, which resulted in litigation before a Joint Adjustment Board and an unfair labor practice charge, both of which AWF lost. The parties entered into Board-mediated settlement discussions and reached a global settlement. [JTX 114-115, Ringler Dec. 3:9-4:27]. AWF signed a series of bargaining agreements with SMWIA Local 88 in Las Vegas, Nevada, effective May 1, 2011 ("Local 88 Agreements"). [JTX 90, 91, 92].

AWF established its relationship with SMWIA Local 88 in May 2011, before the first unfair labor practice charge filed by Roofers Local 162 and before the hearing in front of ALJ Parke. Ms. Pace, counsel for AWF, made statements before ALJ Parke regarding the Local 88 Agreements. [Parke Tr. 16, 29, 36]. Wade Landrum, the Branch Manager for AWF, testified about the SMWIA Local 88 Agreements, stating that the only collective bargaining agreement that AWF had at the time was the agreement with SMWIA Local 88. [Parke Tr. 53:1-6]. Roofers Local 162 had a witness under oath, but did not ask any questions about the scope of the

Local 88 Agreements or ask any questions about the work being assigned to Local 88. Additionally, Judge Parke had been the ALJ in the litigation between AWF and Local 88, and was familiar with the issues in that case. [*See* JTX 113]. It was a deliberate decision for Local 162 not to ask any questions when they should have. Roofers Local 162 was aware of Mr. Landrum's terminal cancer. They waited to try to shamefully take advantage of Mr. Landrum's passing, and that tactic should not be condoned by the Board.

C. Roofers Local 162 has Been Aware of the Relationship Between AWF and SMWIA Local 88 Since Summer 2011.

Roofers Local 162 was aware at the time of the hearing before Judge Parke that AWF had a bargaining relationship with SMWIA Local 88. It was aware of the work being performed by AWF employees. AWF employees testified before Judge Ringler that Modesto Gaxiola met with them on AWF jobsites within 2 to 3 months after AWF began working with SMWIA Local 88 in May 2011 and talked to them about Local 88. [Tr. 327:1-328:25]. They also testified that a former Local 162 employee, Raul Galaz, contacted them between two and four months after they signed up with Local 88 in late April 2011, and offered them money in exchange for Local 88 documents. [Tr. 323:11-324:12; 325:18-20, 341:23-344:6]. The employees' testimony was not disputed or contradicted. It is clear that Roofers Local 162 had knowledge of the SMWIA Local 88 agreement even before the October 24-25, 2011 hearing before ALJ Parke. Mr. Gaxiola's testimony is false in claiming no knowledge of the Local 88 Agreements.

After Judge Parke's decision, AWF made repeated requests and attempts to bargain with Local 162. [JTX 13-17, 19-20, 23, 26-35, 38, 46, 47, 54, 55, 60, 62, 64, 66, 76-88]. Judge Parke, aware of the Local 88 Agreements, did not order AWF to terminate its agreements with Local 88, and therefore AWF continued to assign work to SMWIA Local 88 while attempting to bargain with Roofers Local 162 for a successor agreement. In the spirit of cooperation, AWF provided information to Roofers Local 162 regarding AWF employees, who were members of

SMWIA Local 88. In providing a list of employees, "within the Local 162 bargaining unit" [JTX 22], AWF's counsel was repeating the request as it was made by Local 162 and not viewing it as a term of art. AWF provided information regarding Local 88 members in the spirit of cooperation, not with any intent to deceive. [Tr. 98:19-25]. When Roofers Local 162 asked about Local 88's agreements and benefit contributions by letter dated July 10, 2012 [JTX 59], AWF provided the requested information on July 12, 2013. [JTX 61].

The Board should note that Roofers Local 162 did not request information on other collective bargaining agreements that AWF had in Las Vegas until June 18, 2012 [JTX 50], even though they were aware as of April 2011 that the AWF employees that were members of Local 162 had resigned from Local 162 and the resignation letters were sent from Local 88 [JTX 100]. Mr. Gaxiola had spoken to AWF employees in May-July 2011, who said that they were with Local 88 and wanted to stay with Local 88 [Tr. 327:1-328:25], and Local 162 heard testimony about the Agreement on October 24-25, 2011 in the hearing before ALJ Parke. [Parke Tr. 16, 29, 36, 53]. When Roofers Local 162 finally made the request, AWF provided the requested information. [JTX 61].

Mr. Gaxiola's testimony that July 13, 2012, was the first time that he was aware that work he considers Local 162's work was being performed under the SMWIA Local 88 Agreements [Tr. 236:23-237:1] is blatantly false. AWF employees testified that he visited with them on job sites in the summer of 2011. The employees informed him they were members of Local 88 and wanted to stay with Local 88. [Tr. 327:1-328:25]. The employees were performing roofing repair work. [*Id.*] Therefore, Local 162 has known since at least the summer of 2011 that Local 88 members were performing work for AWF that Local 162 considers its work. The Board should not condone false testimony at hearings.

On April 28, 2011, all six individuals employed by AWF on that date resigned from Local 162 [JTX 100; Tr. 257:1-258:11] and **the Roofers Union subsequently expelled the employees**. [JTX 117; Tr. 259:17-260:11]. The Roofers were aware from the fact that the resignation letters came from SMWIA Local 88 [JTX 100; Tr. 258:2-11] and from communications with AWF employees [Tr. 328:1-7] that AWF employees were represented by SMWIA Local 88. Tom Nielsen, the Local 162 president, testified to hearing rumors about the SMWIA Local 88 Agreement in 2011. [Tr. 167:3-13]. Mr. Gaxiola talked about the relationship between Local 88 and AWF at trade meetings in the summer of 2011. [Tr. 357:1-358:9]. Further, a representative from the International Roofers Union, Raul Galaz, met with the AWF employees in the couple months following their April 28, 2011 resignations and offered to pay them for Local 88 documents. [Tr. 319:3-25; 323:12-325:20; 341:23-344:6; 345:2-11].

Modesto Gaxiola testified that within three months after April 28, 2012, he viewed the NLRB website for information about the dispute between AWF and SMWIA Local 88. [Tr. 264:17-265:16]. Mr. Gaxiola stated that he reviewed the information on the website. [Tr. 269:1-4]. The Local 88 Settlement Agreement is part of the NLRB record [http://nlrb.gov/case/28-Case-022599]. This means that Mr. Gaxiola saw the Joint Motion to Remand and attached Settlement Agreement in the summer of 2011. The Settlement Agreement stated that roofing work would be given to SMWIA Local 88. [JTX 115]. It is incredulous to believe that Roofers Local 162 only discovered in July 2013 that work it claims is within its scope was being performed by SMWIA Local 88 members.

Roofers Local 162 cancelled several bargaining sessions that had been set between AWF and Roofers Local 162. [JTX 16-17, Ringler Dec. 6:27-28]. When the parties finally met face-to-face on July 14, 2013, Mr. Rosenfeld, who was negotiating for Roofers Local 162, requested information on whether employees of AWF were covered by the Local 162 Agreement. Ms.

Pace confirmed that no employees currently working on any project for AWF were members of Roofers Local 162. [Tr.89:4-11]. She did not identify the Local 162 bargaining unit or who might be in the unit. She merely confirmed that AWF currently was not utilizing members of Local 162 on any projects. [*Id.*]. The assignment of work by AWF between the Roofers and Sheet Metal Workers is the subject of a 10(k) proceeding pending before the Board.

The Board should not rely on the letter cited in Roofers Local 162's Brief in Support of Exceptions from Mr. Rosenfeld, counsel for Local 162, dated July 20, 2012 [JTX 62], which purportedly summarized the July 14, 2013 negotiations. The letter is inaccurate and self-serving. Ms. Pace declined to respond to the inaccuracies of the letter in point-by-point detail, but did respond at the time that the letter was inaccurate. [JTX 67]. The behavior of Mr. Rosenfeld during these negotiations demonstrated that Roofers Local 162 was not bargaining in good faith and had no intentions of reaching an agreement. Because the Roofers Local 162's actions during bargaining are not the subject of exceptions by Local 162, AWF will not go into detail in this response, but refers the Board to the Exceptions to the Decision of the ALJ filed by AWF.

III. THE ALJ CORRECTLY FOUND THAT COLLATERAL ESTOPPEL APPLIES TO ROOFERS LOCAL 162'S SECTION 8(A)(5) CLAIM

Under the principle of collateral estoppel, Roofers Local 162 may not relitigate the facts underlying its Section 8(a)(5) claim and the Board should adopt the Decision of ALJ Ringler in this regard.

> A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and *res judicata*, is that a "right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies." *Southern Pacific R. Co. v. United States,* 168 U.S. 1, 48-49 (1897).

Sabine Towing & Transportation Co. 263 NLRB 114, 120 (1982). Once an issue is actually and necessarily decided, it cannot be relitigated in an action involving a party to the prior litigation.

Id. (citing *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5 (1979)). Because the issues were actually and necessarily decided, Roofers Local 162 is estopped from relitigating them.

Under established Board precedent, determinations relating to issues already decided by ALJ Parke cannot be reviewed or relitigated in a subsequent proceeding. *Wynn Las Vegas, LLC*, 358 NLRB 1 (2012); *see also Sabine Towing & Transportation Co.*, 263 NLRB 114 (1982) (dismissing complaint as "an attempt to relitigate" the questions previously determined in case between the same two parties). This is true even though Judge Parke's decision is currently pending before the Board. In *Wynn Las Vegas, LLC*, the Board held, "Under the collateral estoppel doctrine, in the absence of newly-discovered and previously unavailable evidence, a party may not relitigate issues that were . . . litigated in a prior proceeding. These principles apply even where the prior case is still pending before the Board." *Wynn Las Vegas, LLC*, 358 NLRB 1, 3-4 and ftnt. 1 (2012) (internal citations omitted).

The fact that an ALJ is not required to take judicial notice of another ALJ's decision pursuant to the NLRB Division of Judges Bench Book § 11-320 does not address the issue of collateral estoppel. The NLRB Division of Judges Bench Book § 11-300 provides:

> Of course, a judge is also bound to follow particular Board findings in a prior case, where appropriate, under the doctrine of collateral estoppel. See *Great Lakes Chemical Corp.*, 300 NLRB 1024, 1024–1025 and fn. 3 (1990), enfd. 967 F.2d 624 (D.C. Cir. 1992). See also §3–750, "Relitigation of Issues," above. And compare §11–320, "Reliance on Prior Findings of Another Judge," below.

Section 3-750 provides:

> In the absence of newly discovered and previously unavailable evidence or special circumstances, the respondent in a Section 8(a)(5) unfair labor practice case may not relitigate issues that were or could have been litigated in a prior representation proceeding. *Nursing Center at Vineland*, 318 NLRB 901, 903 (1995), *enfd. mem.* 151 LRRM 2736 (3d Cir. 1996).

Collateral estoppel was properly applied in this case.

A. Collateral Estoppel Applies to the Local 162 2010-2012 Agreement.

1. Judge Parke Actually and Necessarily Decided the Issue and Concluded that AWF & Local 162 Did Not Reach Agreement

Judge Parke actually and necessarily decided that AWF did not agree to the Roofers Local 162 2010-2012 Agreement. On June 24, 2011, Roofers Local 162 filed an unfair labor practice charge against AWF alleging, "Within the last six months the above named employers have refused to execute a written collective bargaining agreement agreed to with the Charging Party." [JTX 119 Bates 381]. The Complaint issued by the Region alleged that AWF and the Roofers Local 162 reached a complete agreement. [JTX 119 Bates 356]. The issue of whether AWF and Roofers Local 162 had reached a successor agreement was squarely before Judge Parke, and as one element of the unfair labor practices claimed, it was essential to the judgment entered by Judge Parke. *Marlene Industries Corp. v. NLRB*, 712 F.2d 1011, 105-1016 6th Cir. 1995).

Judge Parke heard lengthy testimony regarding the negotiations for the 2010-2012 Agreement. [*See, e.g.,* Parke Tr. 75-84, 115-121, 137-145]. In its Exceptions to Judge Parke's decision, approximately half of Roofers Local 162's Exceptions related to the findings of fact and law relating to the Local 162 2010-2012 Agreement. [JTX 119, Bates 779-783; *see also* Local 162's Brief in Support of Exceptions, JTX 119 Bates 0805-0811 (arguing "Employer reached an agreement in July of 2010 and thereafter unlawfully failed to sign the Agreement)]. Judge Ringler noted in his decision:

> In its Exceptions, Roofers Local 162 primarily asserted that Farrell and Roofers Local 162 reached an agreement in July 2010, and that ALJ Parke erred when she held that Farrell lawfully refused to sign the Roofers Local 162:10-12 CBA.

[Ringler Dec., 5 n. 10]. Because it was part of the unfair labor practice charge being decided by Judge Parke and the parties litigated it extensively, the issue of whether AWF agreed to the Local 162 2010-2012 Agreement cannot be considered a collateral issue that did not receive

close judicial scrutiny, and *Commercial Associates v. Tilcon Gammino, Inc.* is not applicable. 998 F.2d 1092 (1st Cir. 1993).

The fact that Judge Parke did not go into extensive detail in her opinion does not mean that the issue was not considered and actually decided. Local 162 suggests in its Brief in Support of Exceptions that that the issue was "never fully argued." However, the arguments in the trial [*See, e.g.,* Parke Tr. 72-84, 115-121, 137-145], and in the parties' post-hearing briefs [JTX 119 699; 119 726; 119 753], Local 162's Exceptions [JTX 119 779. 119 784], and AWF's Response [JTX 119 815] demonstrates that the matter was fully argued, and that Roofers Local 162 had a full and fair opportunity to litigate the question in the proceeding before Judge Parke. Therefore, under *Parklane Hosiery Co.* and *Sabine Towing*, Local 162 is collaterally estopped from obtaining another decision from another judge on the 2010-2012 Agreement. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5 (1979); *Sabine Towing & Transportation Co.* 263 NLRB 114, 120 (1982).

2. The Evidence Presented to Judge Ringler Regarding the 2010-2012 Agreement was Not Materially Different Evidence and the Fact Local 162 Put on Additional Evidence Relating to the Exact Same Matter Does Not Overcome the Application of the Collateral Estoppel Doctrine.

Roofers Local 162 suggests that collateral estoppel should not apply because evidence it presented in the second case before Judge Ringler was materially different than the evidence it presented in the first case before Judge Parke. [Br. in Support of Exceptions, 13:3-25]. Local 162 should not be permitted to relitigate the issue of the 2010-2012 Agreement merely because they put on different evidence in the second case. The evidence that Local 162 placed before Judge Ringler was evidence that was available and known to Local 162 during the hearing before Judge Parke, and was not based on different evidence. There was not "materially different

evidence," but only additional, self-serving testimony from the Local 162 Business Agent, Modesto Gaxiola.

Mr. Gaxiola's testimony before Judge Ringler was contradicted by Mr. Landrum's testimony before Judge Parke and the record in the first case, which has been incorporated into the case before Judge Ringler. Mr. Landrum was unavailable to testify before Judge Ringler because he was too will with cancer. [Tr. 26:23-27:4]. In the absence of newly discovered and previously unavailable evidence or special circumstances, the respondent in a Section 8(a)(5) unfair labor practice case may not relitigate issues that were or could have been litigated in a prior representation proceeding. *Nursing Center at Vineland*, 318 NLRB 901, 903 (1995), *enfd. mem.* 151 LRRM 2736 (3d Cir. 1996). There is no newly discovered or previously unavailable evidence, and Roofers Local 162's claims are subject to collateral estoppel.

Local 162's argument is based on a misapplication of statements in *Sabine Towing & Transp. Co.*, 263 NLRB 114, 121 (1982). Local 162 suggests that collateral estoppel would not apply because of a "showing that new evidence was materially different from the evidence relied on when the conclusive judgment was entered in the first case." *Id. Sabine Towing*, however, does not apply in this situation. In *Sabine Towing*, the issue was whether there was a material change in circumstances between 1971 when the first decision was issued and 1976 when the second case was decided. The question in both cases was whether the employer was required to provide the union access to employees on the ship where the employees worked. Based on the circumstances that existed in 1971, it was determined that the union had reasonable access to the employees off of the ship so the employer was not required to provide access. In 1976, the unions had again requested access to the employees on the ship (separate request, five years later), and the employer denied access. The employer argued that the 1971 decision collaterally estopped the Board from reviewing the employer's 1976 decision not to provide access. The

Board, adopting the opinion of the ALJ, found that collateral estoppel would apply unless the General Counsel could show that the relevant circumstances were materially different in 1976 than they were in 1971, and concluded that the General Counsel had failed to show materially different circumstances. *Id.*

Sabine Towing is not a case in which the evidence presented in the first case and the evidence in the second case *relating to the exact same event* are different, but rather there are two separate but similar events, and the focus is on whether there was a material change in circumstances in the time period between the two events that would justify not applying collateral estoppel. ***Sabine Towing* does not apply here, where Roofers Local 162 is attempting to relitigate the exact same circumstances and question that was decided by Judge Parke.** Local 162 has not cited any cases that suggest that it is able to relitigate a matter that was actually decided in previous litigation merely because it put on additional evidence that it had failed to put into the record in the first case. Under the principles of *Sabine Towing,* 263 NLRB at 120, and *Parklane Hosiery,* 439 U.S. at 326, collateral estoppel applies to Roofers Local 162's claims.

B. Collateral Estoppel Applies to the 8(a)(5) Claim Relating to Assigning Work to Local 88.

As ALJ Ringler correctly noted, the gravamen of the Section 8(a)(5) claim is that AWF has repudiated its collective bargaining agreement with Roofers Local 162, assigns work to Local 88, and fails to apply the Local 162 agreements to current AWF employees. [Ringler Dec. 10:34-38]. This is essentially the same issue that was before Judge Parke. Local 162 had notice that AWF changed the terms and conditions of employment it was applying to AWF's employees on April 28, 2012 when AWF completely terminated the bargaining relationship with Local 162. [JTX 1]. Local 162 was aware that contributions to its benefits plans had ceased. [Tr. 158:20-25]. It was aware of changed conditions of employment, and the charge that AWF failed to

provide notice and an opportunity to bargain before instituting changes is really subsumed in the repudiation of the collective bargaining agreement, a matter that was already decided by Judge Parke. The Complaint alleges that since May 1, 2011, AWF "failed to adhere to the terms and conditions of the Agreement that [AWF] had applied to the Unit." [CAGC Exh. 1(e)]. This is exactly what is meant by contract repudiation. The Roofers did not like the remedy and results in the case before Judge Parke, and therefore are trying to get a "second bite of the apple" by bringing a charge based on the changes to the employees' terms and conditions of employment that occurred after April 28, 2011, based on AWF's alleged repudiation of the Local 162 2007-2010 Agreement. Judge Ringler appropriately applied collateral estoppel to prevent this injustice.

Judge Parke and Local 162 were aware of the Local 88 Agreements at the time of the hearing before Judge Parke, as they were part of the testimony. [Parke Tr. 16, 29, 36, 53]. Local 162 was aware that when AWF discontinued working with Local 162, it began working with Local 88. In the first case, Local 162 argued that AWF had repudiated its collective bargaining agreement with Roofers Local 162, and that was one of the issues decided by Judge Parke. [Parke Dec. 7:49-8:4]. The claims brought in the present case are essentially contract repudiation claims. *See, e.g., St. Barnabas Medical Center*, 343 NLRB 1125 (2004) (distinguishing between claims that can be considered complete contract repudiation and those that are a breach of a single provision of the contract in the 10(b) context). The Complaint alleged that since May 1, 2011 AWF failed to adhere to the terms and conditions of the Roofers Local 162 bargaining agreement. [CAGC Exh. 1(e)]. This amounts to total contract repudiation, which is exactly the issue that was before Judge Parke.

It is disingenuous for Local 162 to argue that it did not have notice of the Local 88 Agreements until July 13, 2012. [Local 162 Br. in Support of Exceptions, 9:20-22]. As

discussed in Section II(C) above, Roofers Local 162 learned that AWF was working with Local 88 shortly after AWF discontinued assigning work to Local 162 in April 2011. In the summer of 2011, they spoke to AWF employees who were members of Local 88 and were informed that the individuals wanted to remain with Local 88. [Tr. 327:1-328:25]. Local 162 had the knowledge of the changed terms and conditions of employment, and brought a charge for contract repudiation, which was tried before Judge Parke. In that trial, they heard testimony about the Local 88 agreement, but did not ask any questions about it. Several months later, because Local 162 was not completely satisfied with the decision, they brought a contract repudiation charge couched as a violation of the contract. The issues, however, are the same and ALJ Ringler correctly applied collateral estoppel.

Roofers Local 162 also argues that collateral estoppel should not apply because it did not have the opportunity to request the remedy of contract rescission. [Local 162 Br. in Support of Exceptions, 9:24-28]. This argument is defeated, however, by the fact that in its Exceptions to the Decision of ALJ Parke, Local 162 excepted "to the failure of the ALJ to recommend that any agreement reached with any other union be voided and rescinded to the extent that it is inconsistent with or otherwise interferes with the recognition of the charging party and or the 2010-2012 Agreement." [JTX 119 781]. In Local 162's Brief in Support of Exceptions to the Decision of ALJ Parke, Local 162 stated that the "Employer should be required to withdraw recognition from any other union with respect to any work covered by the terms of the Collective Bargaining Agreement." [JTX 119 812]. Therefore, it is factually inaccurate for Local 162 to claims that they have not had the opportunity to request a remedy of rescission.

Because the issue before Judge Ringler is essentially an issue of contract repudiation and because that is the exact same issue that was before Judge Parke and fully decided by Judge Parke, collateral estoppel applies to the 8(a)(5) charge.

IV. RESCISSION OF THE SMWIA CONTRACT IS NOT AN APPROPRIATE REMEDY, AS THIS IS A JURISDICTIONAL DISPUTE.

There has been an ongoing jurisdictional dispute between the Roofers Union and the Sheet Metal Union in Las Vegas for several years. The issues in the present case spring from that jurisdictional dispute. The jurisdictional issues was the subject of a 10(k) hearing before Hearing Officer Barbara Baynes in Las Vegas, Nevada on June 13, 2013, and the matter is currently pending before the Board. Roofers and Sheet Metal have overlapping claims of jurisdiction, with Sheet Metal claiming extensively more work than the roofers, since they are not limited to roofing. [*See e.g.*, JTX 89-91]. The Board should allow the 10(k) process to be completed, and an order requiring rescission of the Local 88 Agreements is not appropriate.

The cases cited by Local 162 supporting contract rescission did not involve jurisdictional disputes. *Kendall College*, 228 NLRB 1083, 1089 (1977), cited by Local 162 to support restoration of status quo, is inapplicable in this case, as it dealt with a university negotiating directly with its employees, rather than the union, and did not involve two unions with competing jurisdictional claims and competing union contracts. *Harrell ex rel. NLRB v. Am. Red Cross Heart of Am. Blood Servs. Region*, 714 F.3d 553, 558 (7th Cir. 2013), also did not involve two unions and was address only to the rescission of unilateral changes made by the employer, not rescission of another union contract. *Innovative Communications* and *Pacific Crane* also did not involve the jurisdictional issues that are present between AWF, Local 162 and Local 88, which are demonstrated by the 10(k) hearing held on June 13, 2013 between the parties.

V. THE ADMINISTRATIVE LAW JUDGE CORRECTLY FOUND THAT LOCAL 162 VIOLATED THE ACT BY FAILING OR DELAYING IN PROVIDING INFORMATION TO AWF.

The ALJ correctly found that Local 162 violated the Act by failing or delaying in providing information to AWF. AWF requested information on the Local 162 benefits plans to which AWF is expected to contribute since August 10, 2011. [*See, e.g.*, JTXs 6, 7, 9, 14, 22, 26,

29, 31, 32, 52, 60, and 67]. Unions, as well as employers, have a duty to furnish information. *Printing & Graphic Communications Local 13 (Detroit) (Oakland Press Co.)*, 233 NLRB 994 (1977), *aff'd,* 598 F.2d 267 (D.C. Cir. 1979); *see also Teamsters Local 500 (Acme Markets)*, 340 NLRB 251-52 (2003) (the union's duty to furnish information is "commensurate with and parallel to an employer's obligation to furnish it to a union pursuant to Sec. 8(a)(1) and (5) of the Act."). Information relating to the benefits plans to which the Union wants AWF to contribute is presumptively relevant. *See, e.g., Dynacorp/Dynair Servs.*, 322 NLRB 602 (1996) (it is well established that seniority dates, rates of pay, insurance plans, benefits information, pension plans, vacation criteria, incentive plans, and information on other benefits or privileges is relevant).

Local 162 also argued that it had no duty to provide information because there was no bargaining. Local 162 asserts it had no duty to bargain, and therefore no duty to provide information, because the Local 162 2010-2012 Agreement was in effect. [Local 162 Br. in Support of Exceptions, 20:14-15]. Judge Parke, however, had determined that the Local 162 2010-2012 Agreement was not in effect and ordered the parties to bargain. [Parke Dec., 7:40-45; Ringler Dec. 5, n. 9]. Local 162 sent a letter to AWF on January 4, 2012 demanding bargaining [JTX 13], and AWF attempted to schedule multiple bargaining sessions with Local 162. Local 162 therefore cannot claim that there was no bargaining and no duty to provide information.

A delay in providing requested information is also a violation of the Act. *Int'l Credit Serv.*, 240 NLRB 715, 718 (1979). Local 162 delayed several months in providing what little information it did provide. Even when Local 162 requested information from the Trusts, it did not do so for several months after AWF made the request for information. [JTX 57, 58]. Additionally, Local 162 did not show that it had reached out to all of the trust funds, as AWF had requested information of four separate funds [*See, e.g.,* JTX 32, 52], and Roofers Local 162 submitted evidence of contacting only two of those funds. [JTX 57, 58]. Judge Ringler

therefore correctly found that Local 162 violated the Act by failing, refusing, and delaying providing presumptively relevant information.

VI. THE *LUTHERAN HERITAGE VILLAGE-LIVONIA* RULE SHOULD NOT BE OVERRULED.

In evaluating AWF's employment policies, the ALJ applied the *Lutheran Heritage Village-Livonia* rule, as quoted in *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012). [Ringler Dec., 9:42-10:6]. This rule provides a reasonable balance between the employee's Section 7 rights with the employer's right to maintain order in the workplace. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The fact that an employee could possibly read a rule as chilling their Section 7 rights should not be the end of the analysis in determining whether an employment policy is lawful. Applying the dissents view in *Lutheran Heritage Village-Livonia*, as suggested by Roofers Local 162, would make it difficult for an employer to maintain any employment policies and order and control in the workplace. *Lutheran Heritage Village-Levonia* applies the proper balance.

The need to overrule *Lutheran Heritage Village-Levonia* is not, as Roofers Local 162 suggests, apparent in this case. Judge Ringler found under *Costco Wholesale* that the policies alleged in the Complaint to be unlawful are in fact unlawful. The fact that the rules were found unlawful under the existing precedent does not support an argument for changing existing precedent. Roofers Local 162 spends approximately three pages of its Brief in Support of Exceptions making arguments about whey the AWF employment policies should be considered unlawful, basing its argument on the Electronic Communication policy, which prohibits employees from revealing private, confidential, copyrighted or employee information in external communications without required approval, which has been found unlawful in many cases. Local 162 goes onto a tangent regarding how the rule could be applied to protect customer information. It is not clear why Local 162 spends so much time on this argument, as the ALJ

found that the Electronic Communications policy was unlawful because "preauthorization requirements unduly interfere with employees' Sec. 7 rights to 'improve terms and conditions of employment' by seeking assistance 'outside the immediate employee-employer relationship'" [Ringler Dec. 10:22-30]. Local 162 even cited many of the same cases cited by ALJ Ringler. The fact that the ALJ reached the decision espoused by Local 162 applying the *Lutheran Heritage Village-Livonia* standard suggests that the standard is appropriate and does not need to be overruled.

VII. THE REMEDIES ORDERED BY THE ALJ ARE ADEQUATE.

The ALJ remedies are adequate, correct, and consistent with Board precedent. The Board cannot order AWF to sign and apply the Local 162 2010-2012 Agreement between ALJ Parke has already found that AWF did not agree to the Local 162 2010-2012 Agreement. [*See* Section III(A) above]. Rescission and reinstatement of the previous status is also not appropriate for the reasons discussed in Section IV above. As for reimbursing Local 162 for dues, AWF did not employ any members of Local 162 during the applicable period. Its employees were members of Local 88, and the Company paid dues to Local 88. Roofers Local 162 had expelled the AWF employees after the employees resigned from Local 162 and joined Local 88 [JTX 117, Tr. 259:17-260:11], so Local 162 can hardly request dues payments from those employees.

Reading the notice to the employees, mailing the decision to all employees who have worked at Farrell, and providing them the Board's decision are extraordinary remedies that are not warranted in this case. The posting provided by Judge Ringler adequately notifies employees of the violations and the remedy, and Local 162 has not established that anything further is required in this case.

Local 162 also requests that AWF be required to post the proposed NLRB poster for a period of two years. Two Federal Courts have suggested that the posting requirement is not

lawful. *National Ass'n of Mfr. V. NLRB*, ___ F.3d ___, 2013 WL 1876234 (D.C. Cir. May 17, 2013); *Chamber of Commerce v. NLRB*, 856 F.Supp.2d 778 (D.S.C. 2012). Therefore, the Board may not order AWF to post it for a period of two years. This is supported by *National Association of Manufacturers v. NLRB*, in which the Court held that the Board did not have authority to mandate that employer's post a notice unrelated to specific unfair labor practices. 2013 WL 1876234 (D.C. Cir. May 7, 2013).

We also find it ironic that Local 162 wants AWF to post the proposed NLRB poster, which notifies employees of their rights not to join a union as well as the right to join a union, when at the same time Roofers Local 162 has requested that the "right to refrain" language be removed from the notice posted by the Company. [Local 162 Br. in Support of Exceptions, 24:5-23]. The Board should not modify the language in the Notice to remove the language notifying an employee of their right to refrain from union activity. The right to refrain from Union activity is a fundamental right protected by the National Labor Relations Act Section 7. 29 U.S.C. § 157. An employee who reads the Notice that does not include the right to refrain language may erroneously believe that they are required to participate in the union activities listed on the Notice.

VIII. CONCLUSION.

At heart, this is a jurisdictional dispute. Many of the issues will be decided when the Board decides the 10(k) case between AWF, Roofers Local 162, and SMWIA Local 88. The proper remedies will be easier to determine after the jurisdictional issue is resolved.

The ALJ correctly found that Local 162's Section 8(a)(5) claims were barred by collateral estoppel. The issues were properly before Judge Parke in Case Nos. 28-CA-023502, 28-CA-060627, 28-CA-062301 and were fully decided by her. If the Board believes that Judge Parke was in error, it should address that in the Exceptions to Judge Parke's decision, rather than

allowing relitigation of the matters in the present case, where Judge Ringler did not have benefit of all the witness testimony because of the unavailability of a key witness because of terminal cancer, and the Board should adopt the ALJ's decision in this regard.

The ALJ also correctly found that Local 162 had violated the Act by failing and delaying to provide presumptively relevant information. The Board should adopt this funding and order Local 162 to provide the requested information and post a notice for all of its members.

Finally, the remedies outlined by the ALJ are appropriate in this case. Rescission is not an appropriate remedy due to the jurisdictional dispute at the heart of the case. The Board should adopt the remedies in the ALJ's decision and not expand them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Answering Brief in Response to Roofer's Local 162's Exceptions to the Decision of Administrative Law Judge was filed electronically via E-Gov with the National Labor Relations Board Office of Executive Secretary on July 11, 2013 with copy by electronic mail to:

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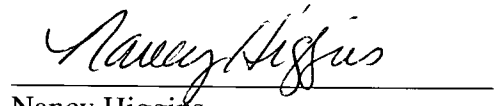

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